



No fatal mistakes

By Joseph D. Tydings
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As a lawyer and former U.S. attorney, I have both prosecuted and defended death penalty cases. As a member of the Maryland House of Delegates and as a U.S. senator, I have studied and dealt with this issue for more than 40 years. While I have never been philosophically opposed to the death penalty, and have supported it in special cases, I now have deep concerns about the failures in our criminal justice system in capital cases.

The Maryland Commission on Capital Punishment - which is holding public hearings in Annapolis and must submit a final report in December - can play a vital role in educating the public and the General Assembly that our present failure to provide competent lawyers for the accused who can't afford one will likely lead to the execution of innocent defendants. The fact that Maryland pays less than any state other than Mississippi for such representation underscores the seriousness of this problem.

The commission needs to address two key issues: First, what is the present risk that Maryland will execute innocent people over the next decade? Second, can and will Maryland ensure that indigent defendants facing the death penalty - generally minorities, frequently mentally impaired - are provided with a competent lawyer and fair trial, as required by the Constitution?

We now know that in recent years, 129 people in the United States who were found guilty of capital offenses in a trial and were facing a sentence of death were later found to be innocent. In some of these cases, witnesses lied; in others, police or prosecutors took constitutionally unlawful shortcuts; in some, the defense lawyer did not put on a defense.

As pro bono counsel, I unsuccessfully litigated a Virginia appeal of a mentally retarded minor who had been convicted and sentenced to death for a crime that I firmly believe he didn't commit, because his court-appointed attorney didn't want to represent him and was basically worthless as his lawyer. After seven years, the Virginia governor ultimately lacked the courage to stay the sentence, and my client was executed.

Maryland is not immune to this type of miscarriage of justice. Kirk Bloodsworth, a resident of our Eastern Shore, was sentenced to death and later found to be innocent. Mr. Bloodsworth is a member of the state study commission today. Too many Marylanders have been prosecuted, convicted and sentenced to life for crimes they did not commit - and in some of those cases, it was only a matter of chance that they were not sentenced to death and executed.

Americans are just beginning to focus on miscarriages of justice in capital offenses and the fact that our nation, in all likelihood, continues to execute innocent people. Former Supreme Court Justice Sandra Day O'Connor - like myself, a supporter of capital punishment - in 2001 stated: "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." Since she made that comment, several more people have been shown to be innocent after being sentenced to death.

An accused innocent is most likely to be charged in a highly emotional atmosphere after a heinous crime has been committed, when there is tremendous public pressure on prosecutors and police to find and charge a defendant. The targets in many of these situations have no financial or family resources and are

forced to rely on state-paid attorneys, who often are inexperienced and unprepared to defend them in this type of case. Defendants with substantial wealth seldom face a risk of execution.

The defense of a person accused in a death penalty case is enormously time-consuming and professionally demanding for a lawyer. When a state fails to provide the funds necessary to retain a competent lawyer, our state justice system is forced to rely on the altruism of a dwindling number of pro bono attorneys willing to endure the economic sacrifice and emotionally draining task of defending a capital case. Without a competent lawyer, the likelihood of a wrongful conviction rises drastically.

Like Ms. O'Connor, I see the deep and irrefutable flaws that are built into our present system of capital punishment. These flaws hold the most risk for those at the margins of society.

I am very skeptical that these flaws can be fairly repaired in today's fiscal climate, where Maryland's state budget is as crunched as any state. A study this year released by the Abell Foundation revealed that the present death penalty system in Maryland has cost the state nearly \$200 million over the last 30 years because of "extra" costs of incarceration and prosecution.

Unless we are prepared to invest even more in the future for competent lawyers, I believe that there is a very real risk that Maryland (and other states that still have death penalty statutes) will execute innocent people. The commission has heard testimony from veteran defense attorneys about the inadequacy of the pay the state provides to attorneys in capital cases. Maryland pays the second-lowest rate in the nation for such attorneys - far below what it costs a lawyer to take on such a case.

Today, the system relies on a dwindling number of lawyers who take the cases at a financial sacrifice because they believe in the importance of providing good counsel to capital defendants.

We must honor America's fundamental democratic and constitutional principle that innocent people shall not be executed. The penalty for conviction in capital cases should be changed to life imprisonment without the possibility of parole until we are willing or able to provide the resources to stop these frightfully tragic miscarriages of justice.

Joseph D. Tydings is a former U.S. senator from Maryland, a former U.S. attorney and a former member of Maryland's General Assembly. He is now a partner in a law firm. His e-mail is tydingsj@dicksteinshapiro.com.

I was delighted to read recently that former United States Senator and U. S. Attorney Joseph Tydings has expressed "deep concerns about the failures in our criminal justice system in capital cases." In an OpEd piece that was published in this newspaper, Senator Tydings raised a very important question: "What is the present risk that Maryland will execute innocent people over the next decade?"

At the risk of being called a carpetbagger, I want to address this issue from Texas, the execution capital of the free world, and say to the people of Maryland that, as Kirk Bloodsworth knows well, the risk is very real. I should say at the outset that I am no wild-eyed, pointy-headed liberal from some out of the way backwash; I am the former elected District Attorney in San Antonio, Texas, the 7th largest city in America, and was, until a few years ago, a strong supporter of the death penalty.

As Bexar County District Attorney, I was responsible for the prosecution of several capital murder cases, each of which resulted in the conviction and execution of the defendant. In 2005, the *Houston Chronicle*, in a remarkable piece of investigative journalism that has complicated my life immeasurably, argued persuasively that one of my prosecutions—the Ruben Cantu case—may have resulted in the execution of an innocent man.

I fervently hope that there are only a few prosecutors and former prosecutors in America today who find themselves, as I do, in the position of having to admit an error in judgment that may have led to the execution of an innocent man.

Maryland and Texas are very different places when it comes to the imposition of the death penalty. We have executed more people since January than Maryland has in the last 40 years. Although our states are very different in material respects, Texas and Maryland are identical in those respects that matter most. The people and courts of Maryland—like

those in Texas--are not infallible. Your courts function as ours do in that, for example, your juries determine guilt or innocence based on testimony from fact and expert witnesses who may or may not be telling the truth and who, even when they tell the truth as they know it, are sometimes simply wrong. As is the case in Texas, the criminal justice system in Maryland is driven on its best day by decisions that are made by imperfect human beings. Try as we do to always get it right, we sometimes get it wrong.

It is against this backdrop—what our states have in common—that I address the issue of innocence and share my perspective as a former major metropolitan, elected District Attorney.

The Ruben Cantu case has become a centerpiece in the innocence discussion in America today because it offers haunting lessons and could happen anywhere--even in Maryland. Ruben Cantu had a fine defense lawyer, a fair judge, and a jury that returned the only possible verdict, based on the evidence that was presented. The trial prosecutor I assigned to the case was one of the most honorable and ethical prosecutors I have ever known. He investigated the case carefully and was confident when he stood before the jury that Ruben Cantu had committed the crime. It can be argued persuasively that Ruben Cantu didn't just receive the fair trial our system promises—he arguably received a perfect trial. And yet, 23 years later, Ruben Cantu has become a poster child in the innocence debate in America today. Whether he was innocent or not, it is clear that the criminal justice system failed him.

What went wrong? How can it be suggested that the system failed in a case in which it is unclear whether the defendant was, in fact, innocent? The answer is simple: Prosecutors are entrusted with vast discretion in deciding whether and how to prosecute capital murder cases. I made an error in judgment by permitting Cantu to be prosecuted for capital

murder based on the uncorroborated testimony of a single eyewitness. The fact that most prosecutors, confronted with the same circumstances at that time, would have made the same decision I made provides me with little comfort today. It was the wrong decision.

Decisions by prosecutors drive the criminal justice system. The very best prosecutors, acting entirely in good faith, make all sorts of judgments in capital murder cases and, because we are human, we make mistakes--even on our best days. Add to that undeniable fact, the reality that judges, jurors, defense attorneys, and witnesses also make mistakes and what you have is a system that, by definition, cannot be relied on to protect the innocent in capital murder cases.

Long before I was confronted with questions about the Cantu case, I had determined that the system we rely on to decide who may live and who must die is simply incompetent to make those decisions correctly in all cases; it is broken and, because it is driven by decisions that are made by imperfect human beings, can't be fixed. I am satisfied, as a former elected prosecutor who has prosecuted death penalty cases successfully, that the system cannot be reformed.

What we have seen over and over again are situations in which witnesses who have nothing but trouble to gain by recanting sworn trial testimony nevertheless do so and for good reasons. We have seen junk science debunked, and the exposure of terrible mistakes by forensic laboratories. And finally, we have seen misconduct and errors by key players within the system. In short, the undeniable fact is that the system we rely on in this country to prosecute capital crimes simply cannot be trusted to protect the innocent.

You have undoubtedly heard the argument from death penalty supporters that there is no proof that an innocent person has ever been executed in the United States. Justice Scalia, in his concurring opinion in *Kansas v. Marsh*, made

that argument. The fact is that, since 1972, 129 death row inmates have been exonerated in America, one of whom is a member of the Maryland Commission.

I would challenge Justice Scalia and the other folks who argue that there is no proof that an innocent person has ever been executed in the United States to make that argument after they have examined the record from Texas. Consider first the clearest of the Texas cases and tell me that the criminal justice system guarantees the protection of the innocent in capital cases.

***Cameron Willingham* was convicted and executed for torching his house in a fire that killed his three children. His conviction was based on expert testimony that was generally considered at the time to be reliable. What we now know with certainty—too late for Willingham—is that what we accepted as expert testimony only a few years ago was really nothing more than junk science; it is now clear that the expert testimony upon which his conviction was based was simply wrong and that, in fact, the State of Texas convicted and executed a man for something that, according to current scientific knowledge, was not even a crime.**

The *Carlos DeLuna* case—also from Texas—produced the execution of a man who was almost certainly innocent. Like the Cantu case, eyewitness testimony was relied on by the prosecution to convict DeLuna for the brutal stabbing murder of Wanda Lopez, a female gas station attendant. In addition, however, there was no investigation of tips that pointed almost immediately to a man who later bragged to friends repeatedly that he had murdered Wanda Lopez. Although he was well known to him, the prosecutor nevertheless argued in his closing that the probable murderer was a “phantom” who existed only in the mind of Carlos DeLuna. Moreover, the prosecutor was personally familiar with the *modus operandi* of the probable murderer—a preference for gas station robberies, knives, and attacking

women, he nevertheless failed to disclose this exculpatory evidence to the defense as required by law.

Although these cases are different from each other in material respects—there was no junk science or misconduct by the prosecution in Cantu or DeLuna and there were no questionable eyewitnesses in Willingham--they have one thing in common, other than the fact that they all occurred in Texas. Whether the Cantu, Willingham, and DeLuna were innocent or not, each of their juries—if they had known what we know today—would almost certainly have returned verdicts of “not guilty” based on the existence of “reasonable doubt.”

Some suggest that it's good enough if we get it right most of the time--that good intentions, strong procedural safeguards, and a fair trial provide sufficient protection. If you believe that we MUST ALWAYS GET IT RIGHT in capital murder cases, that the system MUST do what is intended—guarantee the protection of the innocent--accepting a system that tries hard and gets it right most of the time is simply not good enough when the sanction is so final.

